STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

THE STATE, RESPONDENT,

V.

JOHNNY NEAL SEXTON APPELLANT

APPELLATE CASE NO. 2015-001055

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the court erred in allowing Agent Mike Merckle to give his opinion that the substances in two mason jars were Coleman fuel and ether, both necessary ingredients for making "meth," when the substances were never tested in Appellant's case although Agent Merckle had tested similar substances in prior cases; therefore, the opinion was not reliable as shown by the judge instructing the jury on the spoliation of the evidence; thus, the judge failed to fulfill his role as gatekeeper of the reliability of the evidence

2. Whether the court erred by ruling admissible the testimony that Appellant did not attend the subsequent DSS legal hearings on his three children, which were outside the time period stated in the indictments, and therefore irrelevant to the crime of unlawful conduct towards a child, as well as the witness's testimony that Appellant did not show interest in getting his children back, since this testimony was a gratuitous attack and highly prejudicial?

STATEMENT OF THE CASE

In April 2015, the Lexington County Grand Jury indicted Johnny Neal Sexton on three counts of unlawful conduct towards a child. The three counts were against Sexton's three young children for exposing them to drug activity and deplorable living conditions. See Indictments R.274-275, R. 277-278, and R. 280-281. On April 15-17, 2015, Sexton's trial proceeded in his absence before the Honorable Thomas A. Russo and a jury. R. 1; R. 7, ll.13 – R. 8, ll. 6. Sexton was represented by David M. Mauldin, and the state was represented by Rhonda Patterson and Shannon Davis. R. 1. The jury found Sexton guilty of three counts of unlawful conduct towards a child as indicted. R. 261, ll. 3 – 13. Judge Russo sealed the sentence and issued a bench warrant for Sexton. R. 267, ll. 5 – 14.

On May 6, 2015, Sexton appeared before the Honorable R. Keith Kelly for sentencing. Sexton was again represented by David Mauldin, and the state was represented by Rhonda Patterson. May 6, 2015, R. 268. Judge Kelly opened the sentence sealed by Judge Russo. May 6, 2015 R. 270, ll 20 – R. 271, ll. 2. Judge Kelly sentenced Sexton according to the sentence handed down by Judge Russo which was eight years on each count with each sentence consecutive to the other for a total of twenty-four years incarceration. May 6, 2015 R. 271, ll. 1 – 22. Sexton's attorney filed a notice of appeal. This appeal follows.

STATEMENT OF FACTS

In January 2014, Johnny Sexton and Jamie Norris were living in a small camper in a rented space in a campground near the lake in Lexington. With them were their three small children: the oldest was two years of age and the twins were one year of age. R. 124, ll. 1 – R. 125, ll. 14; R. 128, ll. 1 – R. 130, ll. 2; R. 208, ll. 1 – 19. On January 23, 2014, Deputy Stephen Bair served a rule to vacate on Sexton at the camper. R. 110, ll. 11 – R. 112, ll. 20. The landlord, Norman Swalgreen, had taken out an "eviction notice" on Sexton in January 2014 for not paying the rent. Swalgreen also obtained the eviction notice because of complaints from other people at the campground about loud arguments occurring at Sexton's property. R. 123, ll.18 – 25; R. 124, ll. 25 – R. 125, ll. 14; R. 128, ll. 1 – 25; R. 130, ll. 19 – R. 131, ll. 25.

On February 21, 2014, Deputy Bair served a writ of ejectment on Jamie Norris at the camper. Sexton was not present. R. 113, ll. 9 – 23. Swalgreen, the landlord, had called law enforcement that same day when he heard Sexton threatening to kill the woman living with him. R. 135, ll. 1 – R. 136, ll. 5.

Deputy Bair had gone to the camper alone on February 21, but as he was attempting to locate the property, he met the worker from the Department of Social Services (DSS), Olivia Sinclair Woods, who was also looking for the property. R. 114, ll. 1 – 25. When they arrived at the camper, Ms. Sinclair Woods told Norris that DSS had received a report of alleged abuse or neglect of the Sexton children. Norris became very upset and broke down crying. Norris was finally able to talk with them and gave permission for them to enter the camper. R. 203, ll. 11 – R. 204, ll. 13; R. 207, ll. 2 – 25.

Once inside, Ms. Woods described the conditions as "deplorable." There was "little to no food" in the home; trash was strewn throughout, and there was very little space. They were "crouched together on the couch." The children were minimally clean. She believed the children were "at a risk of harm in the camper." They were too young to protect themselves. The children were removed that day and transported as law enforcement placed them in emergency protective custody. R. 208, ll. 1 – 212, ll. 18.

When Deputy Bair entered the home after Norris gave them permission, he saw open mason jars in the kitchen, a funnel, filter, and other items that he believed could possibly be used in the manufacture of methamphetamine based on his training. He immediately removed everyone from the camper or RV to a safer place outside. He contacted the narcotics unit of the Lexington County Sheriff's Department, to have them come out and check if there was an active lab. R. 115, ll. 24 - R. 117, ll. 15.

Agent Mike Merckle responded and went to the camper. He obtained consent to search the home from Norris. R. 168, ll. 5 – 25; R. 170, ll. 13 – R. 172, ll. 23. Agent Merckle had been trained through the Drug Enforcement Agency (DEA) to be a certified methamphetamine technician to enable him to locate, identify, and safely handle methamphetamine labs. R. 169, ll. 1 – 17.

In the Sexton home, Agent Merckle found items that he said would be used in the manufacture of methamphetamine. These items included household items such as ammonia, coffee filters inside a red funnel, two mason jars with liquids in them which Agent Merckle said, based on his training and experience, were Coleman camp fuel and ether. Defense counsel objected to this testimony about the content of the jars which was overruled. Agent Merckle described the fuel as having an odor and had a viscosity different from water or oil.

He did smell the liquid and believed it was camp fuel. There was also a coffee bean grinder. R. 175, ll. 1 – R. 181, ll. 22.

Agent Merckle did not take these items into evidence because he said the chemicals used in the process were extremely dangerous. It was necessary for law enforcement to destroy the chemicals found in the camper. It was a "very dangerous process." If a person were in an enclosed area where someone was smoking meth, someone could breathe it in. "Having small children around that was a risk of harm to them." R. 181, ll. 23 – R. 184, ll. 9.

In a pretrial motion, defense counsel moved that Agent Merckle not be able to testify as to what the liquid was in the mason jars. It would be pure speculation that the liquids were Coleman fuel and ether because the liquids were not tested before they were destroyed. The state argued that Agent Merckle was a certified methamphetamine technician, and could say what the liquids were based on his training and experience. R. 66, ll. 1-18. The judge then said:

Court: You're going to have him qualified as an expert?

Ms. Davis: I can. I can attempt to.

Court: I think you have to if he's going to give an opinion.

Ms. Davis: I think so.

R. 66, ll. 19 – 25.

The judge then said that he would let the state go through the qualifications and defense counsel could cross - examine as to whether he can qualify as an expert. The judge decided they would revisit that at the "appropriate" time. R. 67, ll 1 – 14.

At trial, the state went through Agent Merckle's qualifications. Agent Merckle testified that he had been through training offered by the DEA Academy to become a

certified methamphetamine technician to locate, identify and safely handle methamphetamine labs. He said he taught other law enforcement officers about "meth labs." He had testified in court before. There were no questions about his publications nor how many times had had been qualified as an expert. The state then offered him as an "expert as to clandestine meth labs and detection." R. 168, ll. 5 – R. 170, ll. 9.

Defense counsel objected. The judge then ruled:

> All right. Overruled. I'll allow it.

R. 170, ll. 10 – 11.

When Agent Merckle testified that the liquid in the two mason jars were Coleman fuel and ether which were used in making meth, defense counsel objected. Counsel Stated:

> Objection, Your Honor, to that based on my prior motion, Your Honor, testimony about the contents of the jars.

R. 179, ll. 1-25.

Agent Merckle testified that they did not take the items they found into evidence because they were dangerous and had to be destroyed 99% of the time. R. 181, ll. 23 – R. 183, ll. 12.

During cross examination, Agent Merckle admitted that he had taken samples from liquid suspensions in the past. However, he did not take samples from the liquids in the two mason jars found in the Sexton camper. In his report, Agent Merckle wrote that these two jars were the only items found. R. 187, ll. 1 – 23; R. 188, ll. 1 – 5. .

At the close of the state's case, defense counsel made a directed verdict motion and renewed all his prior motions and objections which the judge denied. R. 218, ll. 6 – 22. The following day of trial, when Appellant Sexton did not appear for trial, the judge decided that he would take up the motions at the close of all the evidence. If Sexton appeared for trial and

wanted to testify, that he would allow it. Defense counsel then renewed all of his prior motions and objections which the judge again denied. R. 220, ll. 1 – R. 222, ll. 24.

Jamie Norris testified at trial for the state. She had pled guilty to two counts of unlawful conduct towards a child, and was incarcerated at the Department of Corrections (DOC) at the time of trial. She told of becoming addicted to methamphetamine. She and Sexton lived together five years and had the three boys. She started taking "meth" because she had been taking adderall but no longer had health insurance and could not see a doctor. Sexton had suggested she try "meth" to see if it would help. She became addicted. R. 81, ll. 1 – R. 85, ll. 8.

On cross-examination, Norris admitted that she pled guilty to only two counts of unlawful conduct towards a child and received ten years suspended to only four years in prison and two years of probation. She admitted that she would be released from prison the next year. R. 106, ll. 1- R. 107, ll. 5.

Norris then testified that she and Sexton had an argument on the morning of February 21, 2014 because he had been out all night and she thought he had been cheating on her. Sexton began hitting her and kicking her. Then he left. She admitted that she was upset with him because he got "physical" with her. R. 108, ll. 14 – R. 109, ll. 25.

Sexton used "meth" also, and learned to cook it. Norris used the drug multiple times a day. Sexton usually cooked the drug in the van but sometimes did in the camper. She had her own truck and would take the children to a friend's house or just ride around when Sexton cooked "meth" in the camper. When they smoked the drug, the children would be in the other room. It was a small camper with two rooms and a kitchen. She sometimes bought the Sudafed and batteries and the Coleman fuel for the cooking. When she smoked, she

would be "high" six to eight hours. She would take care of the children during that time also. R. 90, l. 1 – R. 94, ll. 4.

When law enforcement and DSS came to her house on February 21, 2014, Norris admitted that she gave them permission to search the camper. She also admitted that she nor Sexton did not clean the camper, and did not protect their children. R. 94, ll. 5 – R. 96, ll. 25.

Olivia Woods, the DSS worker, testified that there were additional hearings involving the custody of the children after they were placed in emergency protective custody. Even though she was incarcerated in DOC, Norris came to the hearings. Sexton did not appear at any of the subsequent hearings. She said that Sexton did not show any interest in getting his children back. R. 212, ll. 1 – R. 213, ll. 5.

Defense counsel then told the judge that he had a motion he needed to take up outside the presence of the jury. The judge excused the jury. Counsel moved for a mistrial because the state brought up improper bad act evidence that was outside the dates of the indictment. The indictment alleged wrong doing by Sexton between November 1, 2013 and February 2014. The state just went into events subsequent to the dates in the indictments when they introduced testimony that he did not attend the hearings about his children and was not interested in getting them back. R. 213, ll. 6 – 21.

The state argued that based on the questions asked by the defense of Norris, it appeared that one defense of Sexton was that the blame was all on Norris and that Sexton was coming to get his children. This testimony was allegedly brought out to counteract that defense. R. 213, ll. 22 – R. 214, ll. 5.

The judge denied defense counsel's motion for a mistrial and said that the testimony at issue was replying to counsel's argument in opening. Even though the opening was not

evidence, he thought the testimony was "appropriate." Defense replied: "I just say that I think it is improper and take exception to your ruling." R. 214, ll. 6 – 14.

The judge agreed to give the charge on the spoliation of evidence requested by defense counsel. The state asked that it not be given. The judge agreed with defense counsel. The judge ruled:

> I think I agree with Mr. Mauldin. I think it's appropriate to charge it.....But I think because what you have is those chemicals whatever they were.. The allegation is those chemicals that are used to cook meth. Without them being tested, without there being any forensics done on them, just simply that the officer smelled them and based on his experience and his education he knew it to be what it was and then they just tossed it. They could have taken a sample of it in a vial and preserved that for testing as Mr. Mauldin points out. The containers weren't dusted for prints. .....But I do think that in a case where evidence like this was disposed of without preserving any---without testing it or preserving it, I think it's an appropriate charge, but you can argue whatever it is you need to argue in your closing.

R. 225, ll. 18 – R. 226, ll. 15.

ARGUMENT

I

The trial court erred in allowing Agent Mike Merckle to give his opinion that the substances in two mason jars were Coleman fuel and ether, both necessary ingredients for making "meth," when the substances were never tested in Appellant's case although Agent Merckle had tested similar substances in prior cases; therefore, the opinion was not reliable as shown by the judge instructing the jury on the spoliation of the evidence; thus, the judge failed to fulfill his role as gatekeeper of the reliability of the evidence

All expert testimony must meet the requirements of Rule 702, SCRE regardless of whether it is scientific, technical, or otherwise. The trial judge has a duty to serve the gatekeeper function in assuring the reliability of expert testimony. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). This also applies to non-scientific evidence. See State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009).

In State v. White, id., two prongs must be met: (1) the qualifications of the expert must be sufficient; and (2) there must be a determination that the expert's testimony will be reliable.

Agent Merckle's opinion was not reliable. The state presented no evidence of his publications nor if he had ever been qualified as an expert in court prior to Sexton's trial. The state did not present sufficient evidence of Agent Merckle's qualifications to meet the requirements of Rule 702, SCRE.

In State v. Council, *supra,* the Supreme Court wrote that before expert evidence is admitted, the trial court must determine it is reliable. In State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001), the Supreme Court held that reliability is a "central feature of

Rule 702 admissibility." The Supreme Court ruled in State v. White, *supra,* that this reliability standard applied to non-scientific evidence as well.

The trial judge abrogated his role of gatekeeper of the evidence to ensure its reliability. The judge admitted, when he agreed to give the spoliation charge, that the liquids should have been tested before they were destroyed. This was admitting that the evidence was not reliable. The judge should not have allowed the testimony about the liquids to be admitted because there was no reliability that the liquids were what Agent Merckle said they were. The only evidence that the liquids were Coleman fuel and ether was the smell by Agent Merckle and the way the liquids looked. This was not sufficient to ensure reliability.

Agent Merckle admitted that he had taken samples of similar liquids in other cases and had it tested, but he did not in Sexton's case. The evidence was destroyed before it could be tested.

Jamie Norris' testimony was the main evidence against Appellant Sexton. Defense counsel indicted this in his opening:

> Their whole case relies on Jamie Norris, her testimony. Whether they were together at the time. How long they had been together. Whether they were living there. Whether they had not been living there. Whether they had been making meth. Whether he was responsible for the condition of that. It's entirely on her.

R. 80, ll. 4 – 10.

However, Norris' credibility was questionable. Not only had she been addicted to meth, she had reason to lie against Sexton. She admitted that she thought he was cheating on her, and he became physically abusive to her. In addition, she received only four years of active prison time when Sexton received twenty-four years.

ARGUMENT

II

The court erred by ruling admissible the testimony that Appellant did not attend the subsequent DSS legal hearings on his three children, which were outside the time period stated in the indictments, and therefore irrelevant to the crime of unlawful conduct towards a child, as well as the witness's testimony that Appellant did not show interest in getting his children back, since this testimony was a gratuitous attack and highly prejudicial.

Olivia Woods, the DSS worker, testified that there were additional hearings involving the custody of the children after they were placed in emergency protective custody. Even though she was incarcerated in DOC, Norris came to the hearings. Sexton did not appear at any of the subsequent hearings. Ms. Woods said that Sexton did not show any interest in getting his children back. R. 212, ll. 1 – R. 213, ll. 5.

Defense counsel objected as this testimony of appellant's alleged "bad conduct" was outside the scope of the indictments (and therefore irrelevant), and counsel moved for a mistrial. The judge ruled that this testimony was proper and admissible. The mistrial motion at that point was moot. R. 213, ll. 6 – R. 214, ll. 14.

Rule 401, SCRE, provides that relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402, SCRE, provides that evidence which is not relevant is not admissible.

Rule 403, SCRE, provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Whether Sexton attended the hearings for his children was totally irrelevant to the charge of unlawful conduct towards a child. When defense counsel argued that the subsequent hearings were outside the scope of the indictment, he was arguing that the subsequent hearings were not relevant. Therefore, that testimony should not have been admitted because the bad act evidence was a gratuitous attack on Sexton's character. It had nothing to do with what happened in that camper between November 1, 2013 and February 21, 2014. It had nothing to do with the charge of unlawful conduct towards a child. The state brought out this testimony just to make Sexton look bad and that he was guilty because he did not care about his children. This evidence was highly prejudicial to Sexton.

The hearings had to have occurred after the time period stated in the indictments because the indictments were concerned with the time period that the children were living with Sexton and Norris. These hearings had nothing to do with the charge as alleged in the indictments.

Rule 404(b), SCRE, provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

The judge admitted the testimony because he said it was in reply to the defense counsel's opening remarks. R. 214, ll. 6 – 10. However, defense counsel made no argument in his opening that Norris was to blame for all of the unlawful conduct towards a child.

Defense counsel's argument was based on the credibility of Norris in that the state's entire case relied on Norris' testimony. Counsel stated in his opening:

> Their whole case relies on Jamie Norris, her testimony. Whether they were together at the time. How long they had been together. Whether they were living there. Whether they had not been living there. Whether they had been making meth. Whether he was responsible for the condition of that. It's entirely on her.

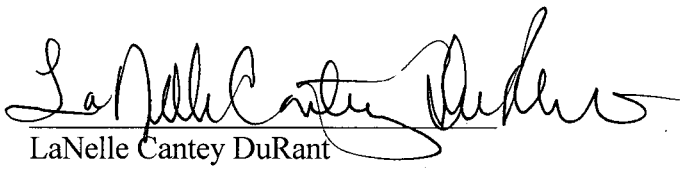
R. 80, ll. 4 – 10.

The trial judge erred in ruling that this testimony was proper. This was an evidentiary error. Since the judge ruled that the testimony was proper, the mistrial became a moot issue.

CONCLUSION

Based on the above, Appellant's convictions and sentences should be vacated, and his case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of July, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

July 29th, 2016

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of July 2016.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of July, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.